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IN THE

Supreme Court of the United States

October Term, 1969

No. 108

THE COLONNADE CATERING CORP.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S BRIEF

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Opinions Below

The United States Court of Appeals for the Second Circuit rendered an opinion written by District Judge Walter R. Mansfield, of the Southern District of New York, sitting by designation. It is reproduced in the Single Appendix, pp. 43a-57a. This opinion is reported at 410 F.2d 197 (2d Cir. 1969).

The United States Court of Appeals for the Second Circuit reversed a memorandum and order of June 28,

1968 of District Judge Jack B. Weinstein of and for the United States District Court for the Eastern District of New York, granting the petitioner's request for the return of a quantity of its bottled liquor seized by agents of the Internal Revenue Service. Judge Weinstein's memorandum and order are reproduced in the Single Appendix, pp. 38a-42a. His memorandum was not reported.

Jurisdiction

The United States Court of Appeals for the Second Circuit entered its judgment on March 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) by a petition for a writ of certiorari filed on May 13, 1969. The Court granted certiorari on October 13, 1969.

Question Presented

Did the forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail liquor dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of a quantity of bottled liquor violate the Fourth Amendment?

Constitutional, Statutory and Other Provisions Involved

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

26 U.S.C. §5121(a)

Imposition and rate of tax

(a) Retail dealers in liquors. Every retail dealer in liquors shall pay a special tax of $54 a year. * * *

26 U.S.C. §5146(b)

Preservation and inspection of records, and entry of premises for inspection

* * *

(b) Entry of premises for inspection.—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

26 U.S.C. §7342

Penalty for refusal to permit entry or examination

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

26 U.S.C. §7606(a)

Entry of premises for examination of taxable objects

(a) Entry during day.—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

Rule 41(e) of the Federal Rules of Criminal Procedure

Search and Seizure

* * *

(e) Motion for return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant * * *.

Statement of the Case

The petitioner initiated this proceeding under Rule 41(e) of the Federal Rules of Criminal Procedure in the United States District Court for the Eastern District of New York, District Judge Weinstein presiding, for the return to it of some bottled liquor which agents of the Internal Revenue Service illegally seized from its locked liquor storeroom after a warrantless and forcible entry without its consent, as well as over its objections. District Judge Weinstein in a memorandum and order of June 28,

1968 granted the petitioner's motion for the return of its illegally seized property. In two paragraphs of his memorandum he stated the facts:

> The facts are undisputed. The petitioner, Colonnade Catering Corp., conducts a catering business and has a New York State liquor license. While a party was in progress, three Internal Revenue Service special investigators accompanied by a Nassau County policeman arrived at petitioner's premises at approximately 4:00 P.M. on May 18, 1968. (One of the Internal Revenue investigators, while a guest at petitioner's premises the previous week, had noted possible violations of the excise tax law.) They had no search warrant.
>
> After looking around the ballroom (a search which led to no seizures and the legality of which is not in issue here), the investigators demanded that the petitioner's locked liquor storeroom — located approximately seventy-five feet from the entrance to the ballroom — be opened for their inspection. Petitioner's president, the only person authorized to unlock the storeroom, refused. The investigators, who had been joined by the Internal Revenue Service area supervisor, forcibly broke into the storeroom and removed fifty-three bottles of liquor. No arrest was made then or since (38a-39a).

These facts come from the petitioner's affidavits, and a statement to District Judge Weinstein during the course of argument before him (31a-32a). The government's conclusory affidavit, by an assistant United States attorney without any personal knowledge of the facts, contains nothing, as this paragraph from it demonstrates:

> The facts of this case and the law governing these facts are fully set forth in the Government's Memorandum of Law which is submitted herewith. Upon

> information and belief and after conversations with the Special Investigators involved in this case, it is submitted that the inspection, examination and seizure here complained of were authorized by statute and were lawful in all respects (76a).

After Judge Weinstein's memorandum and order of June 28, 1968, the government took the case to the Second Circuit. Both parties as well as the Second Circuit treated this appeal as if it were under 18 U.S.C. §3731, as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237.

In this Court in its brief in opposition to the petition for a writ of certiorari, the government conceded (at p. 6) that no appeal lay under 18 U.S.C. §3731. However, the government took the position that the Second Circuit had jurisdiction over the government's appeal under 28 U.S.C. §1291. The petitioner agrees. Thus the only issue in the case is whether the warrantless search and seizure by agents of the Internal Revenue Service violated the Fourth Amendment.

On this issue the Second Circuit reversed District Judge Weinstein on the ground that 26 U.S.C. §§5146(b) and 7606(a), providing for administrative inspections by representatives of the Treasury Department, resulted in an advance waiver of petitioner's rights under the Fourth Amendment. The petitioner takes the position that these statutory provisions are not susceptible of such a construction; and that if they were, then they themselves would violate the Fourth Amendment.

Summary of Argument

In the past century there has been a great growth in the number of administrative agencies. Some of these agencies have been empowered to issue subpoenas. Some have been empowered to make inspections. Some have been empowered to do both. However, to protect our ancient liberties, the exercise of such powers should be held to be subject to the provisions of the Fourth Amendment. The detached scrutiny and the consequent deliberate, impartial judgment of a judicial officer should be placed between the administrative agency and the individual. An inspection without consent by an administrative agency should not be sanctioned unless there has been a compliance with the requirements of the Fourth Amendment. The founding fathers put those requirements into the Fourth Amendment in order to safeguard to the individual a certain area that is sacred to him. Administrative agencies as well as other organs of government should respect those safeguards.

ARGUMENT

The forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of a quantity of bottled liquor violated the Fourth Amendment.

In accordance with the spirit of our law, embodied in constitutions and bills of rights, we guarantee to the individual a certain area, physical as well as mental, that is free from intrusion by the government. The Fourth Amendment is part of this guarantee.

As the Court stated through Mr. Justice Stewart in *Katz* v. *United States,* 389 U.S. 347 (1967), where the Court held a public telephone booth to be within the protection of the Fourth Amendment:

> • • • searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions. 389 U.S. at 357.

Or as the Court put it through Mr. Justice Harlan in *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), where the Court gave standing to an indicted union official to object at his state trial to documents seized from the union office that he shared with others:

> • • • it is settled for purposes of the amendment that "except in certain carefully defined classes of cases, a search of private property without proper consent is

'unreasonable' unless it has been authorized by a valid search warrant." 392 U.S. at 370.

None of the few special exceptions is involved here.

Or yet again as Mr. Justice Fortas put it in Part II (in which Mr. Justice Douglas joined) of his opinion, concurring in part and dissenting in part, in *Alderman* v. *United States,* 394 U.S. 165 (1969):

> • • • The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons. 394 U.S. at 205.

The reason for the requirement of a warrant is to interpose the detached scrutiny and the consequent deliberate, impartial judgment of a judicial officer between the individual and government agents. As the Court put it through Mr. Justice Stewart, in *Katz* v. *United States,* 389 U.S. 347 (1967), referring to the governmental agents in that case:

> • • • They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. • • •
>
> • • •
>
> • • • And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police." *Id.* at 97.
>
> These considerations do not vanish when the search in question is transferred from the setting of a home,

> an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. * * * 389 U.S. at 356, 358-59.

Thus in the companion cases of *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and *See* v. *City of Seattle,* 387 U.S. 541 (1967), where the Court noted probable cause "to re-examine whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights" (387 U.S. at 525), the Court held that they did; and overruled *Frank* v. *Maryland,* 359 U.S. 360 (1959) "to the extent that it sanctioned such warrantless inspections" (387 U.S. at 528). In *Camara,* which involved a residence, the Court through Mr. Justice White reasoned:

> * * * The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials. * * *
>
> * * *
>
> * * * except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. * * *
>
> * * *
>
> In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reason put forth in *Frank* v. *Maryland* and in other cases for upholding these warrantless

searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections. * * * 387 U.S. at 528, 528-29, 534.

In *See*, which involved commercial premises, the Court through Mr. Justice White added:

> We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure. * * * 387 U.S. at 545.

Even in *Frank* v. *Maryland*, 359 U.S. 360 (1959), which the Court overruled in *Camara* to the extent that it sanctioned warrantless inspections, the Court pointed out that the administrative official there involved could not make a forcible entry:

> * * * Moreover, the inspector has no power to force entry and did not attempt it. A fine is imposed for resistance, but officials are not authorized to break past the unwilling occupant. 359 U.S. at 366-67.

In addition, a Fifth Circuit case may be cited as *contra* to the Second Circuit's decision in the instant case. *United States* v. *Frisch*, 140 F.2d 600 (5th Cir. 1944).

It is also relevant to note that the reach of the Fourth Amendment extends not only to administrative inspections, but also to administrative subpoenas: once again judicial review is interposed between the individual and the administrative agency. As the Court stated through Mr. Justice White in *See* v. *City of Seattle*, 387 U.S. 541, 544-45:

> It is now settled that, when an administrative agency subpoenas corporate books or records, the

Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.

It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field. Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search, *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 202, is the subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises.

For a collection of many cases, state as well as federal, see Rogge, *Inquisition by Officials: A Study of Due Process Requirements in Administrative Investigations*—I, 47 Minn.

L. Rev. 939 (1963); II, 48 Minn. L. Rev. 557 (1964); III, 48 Minn. L. Rev. 1081 (1964).

We submit that *Camara* and *See* are dispositive of the case at bar.

For the past 300 years and more, powerful voices among us have pointed out the importance of guaranteeing to the individual a certain area that is free from intrusion by the state. As early as 1603 in *Semayne's Case,* 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603), the court stated: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose * * *."

Coke in his *Institutes* wrote that a man's house was his castle. 3 INST. *162.

The elder Pitt, Lord Chatham, declared movingly in the reign of George III: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail —its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!" 1 Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* 42 (1858).

The practice of issuing search warrants arose in England in the middle of the 1600s. Before that time Coke in his *Institutes* stated that in the absence of an indictment justices of the peace had no power to issue a warrant "to search for a felon, or for stolen goods, for they being

created by an act of parliament have no such authority granted unto them by any act of parliament." 4 *Inst.* *176-*77. But after the middle of the century Matthew Hale expressed a contrary opinion:

> In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them, and farther to abide such order as to law shall appertain. * * *

2 Hale, *The History of the Pleas of the Crown* 113 (published by Emlyn from the original manuscripts, Wilson ed. 1778).

Search warrants were used originally to recover stolen property. With the passage of the Licensing Act of 1662 for publications, the crown took to the use of these warrants in a general form to search for writings alleged to be seditious and for their authors, printers, and publishers. It was such a warrant which was used against John Wilkes and No. 45 of his paper the *North Britain*. This number came out in April 1763 and contained a biting criticism of George III's message to Parliament. The king's ministers regarded it as a seditious libel and Lord Halifax, one of the secretaries of state, issued a general warrant. This warrant was ruled to be illegal, and the various resulting actions against the king's messengers were estimated to have cost the government as much as 100,000 pounds. 3 May, *Constitutional History of England* 6, 7 (7th ed. 1882). Wilkes recovered 4000 pounds from Lord Halifax himself.

Not long thereafter Lord Halifax furnished the court with another opportunity to consider general warrants. This time the offending publication was *The Monitor,* or *British Freeholder.* The warrant differed from that used against Wilkes in that it named the person, John Entinck, whose effects were to be seized, but it put no restrictions upon the officers as to the scope of the search. Entinck sued those who conducted the raid. The jury found a special verdict, stating the facts of the raid but setting up that such warrants had been in common use. Lord Camden, with the unanimous concurrence of the other judges of the court, ruled that general search warrants were illegal. To permit them, he reasoned, "would destroy all the comforts of society." *Entinck* v. *Carrington,* 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818 (1765). According to the report of the case in 19 How. St. Tr. 1029, Lord Camden stated that to sanction the practice of issuing general search warrants "would be subversive of all the comforts of society." At 1066.

Just as in the mother country so in the colonies there was objection to general searches. However, in the colonies the resistance was to searches for goods on which duties had not been paid rather than for publications. Parliament at the same session in 1662 in which it enacted a licensing act for publications, passed equally drastic measures for the enforcement of the revenue laws. The chief weapon of enforcement was the writ of assistance. This was a blanket permit issuable to anyone, authorizing him to search any suspected place. The only limitation was that the search had to be in the daytime. Proceedings under this statute appear to have aroused little opposition

in England; but in the colonies, where taxation was none too popular irrespective of the methods of collection, the story was otherwise. In the course of time determined opposition arose. In 1761 in Massachusetts the legality of writs of assistance was questioned in *Paxton's Case.* The advocate general for the crown was James Otis and as such it became his duty to argue for their validity. Instead he resigned his office and took the other side of the case. In a masterful address he denounced writs of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book." 2 *The Works of John Adams* App. 523 (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 63 (1823). He further declared that they would place "the liberty of every man in the hands of every petty officer." 2 *The Works of John Adams* App. 524 (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 66 (1823). Mr. Justice Black quoted this poignant comment in his dissenting opinion in *In re Groban,* 352 U.S. 330, 338 (1957).

The judges in *Paxton's Case* almost convinced by Otis's argument sent to England for advice; but subsequently in obedience to orders from the ministry, recognized the writs.

Although the case was lost, the cause was not. John Adams, who heard Otis's argument, later wrote:

> Every man of a crowded audience appeared to me to go away as I did, ready to take up arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great

Britain. Then and there the child independence was born.

Letter to William Tudor, March 29, 1817, printed in 8 *Old South Leaflets* 57, 60 (no. 179, p. 4).

Justice Bradley subsequently stated in his opinion for the Court in *Boyd* v. *United States,* 116 U.S. 616, 626 (1886), that Lord Camden's "great judgment in that occasion [*Entinck* v. *Carrington,* 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818, 19 How. St. Tr. 1029 (1765)] is considered as one of the landmarks of English liberty."

In *Boyd,* the Court held that a provision of an act of Congress which required, in the words of the Court, "a compulsory production of a man's private papers in a proceeding to forfeit his property for alleged fraud against the revenue laws" violated the Fourth Amendment's prohibition of unreasonable searches and seizures. Justice Bradley explained:

> • • • And any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. 116 U.S. at 631-32.

In the same vein Justice Brandeis wrote in his dissenting opinion in *Olmstead* v. *United States,* 277 U.S. 438 (1928):

> • • • The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.

> They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. * * * 277 U.S. at 478.

The *Olmstead* case was questioned in *Berger* v. *New York,* 388 U.S. 41 (1967) and overruled in *Katz* v. *United States,* 389 U.S. 347 (1967). Mr. Justice Douglas in his concurring opinion in *Berger* stated that *Berger* overruled *Olmstead sub silentio.* 388 U.S. at 64.

In the same vein the Court wrote in *Wolf* v. *Colorado,* 388 U.S. 25, 27 (1949):

> The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society.

The actual holding in *Wolf,* that material illegally seized by state officers was admissible in a state court proceeding, was overruled in *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

Today the reach of the Fourth Amendment, of the right to be let alone by the government (to paraphrase the language of Justice Brandeis in his dissenting opinion in *Olmstead*), extends far beyond one's home. It extends to a sealed letter entrusted to the mail. *Ex parte Jackson,* 96

U.S. 727 (1877). It extends to an individual in a business office. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). It extends to one in a friend's apartment. *Jones* v. *United States,* 362 U.S. 257 (1960). It extends to one in a taxicab. *Rios* v. *United States,* 364 U.S. 253 (1960). It extends to a guest in a hotel room. *Stoner* v. *California,* 376 U.S. 483 (1964). It extends to a person in a public telephone booth. *Katz* v. *United States,* 389 U.S. 347 (1967). It extends to police detention for the purpose of taking fingerprints. *Davis* v. *Mississippi,* 394 U.S. 721 (1969). It extends to an open field adjacent to one's house which one seeks to preserve as private. *Wattenberg* v. *United States,* 388 F.2d 853 (9th Cir. 1968). And it extends to commercial premises which are not open to the public. *See* v. *City of Seattle,* 387 U.S. 541 (1967).

The approach of the Fourth Amendment, that of guaranteeing to the individual a certain area that is free from intrusion by the government, expresses itself in many other ways than a proscription of unreasonable searches and seizures. It expresses itself, for instance, in giving a right to an individual to have pornography in his own home. *Stanley* v. *Georgia,* 394 U.S. 557 (1969). It expresses itself, for instance, in protecting a husband and wife in the practice of contraception. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

The approach behind the Fourth Amendment, that of guaranteeing to the individual a certain area that is free from intrusion by the government, has helped to bring about the protection of confidential relationships such as those between attorney and client, and husband and wife. The protection of the confidential communications between

attorney and client goes back to the reign of Elizabeth I. *Berd* v. *Lovelace,* Cary 62, 21 Eng. Rep. 33 (1576-1577); *Kelway* v. *Kelway,* Cary 89, 21 Eng. Rep. 47 (1579-1580); *Dennis* v. *Codringham,* Cary 100, 21 Eng. Rep. 53 (1579-1580). Similar protection to the confidential communications between husband and wife may be traced back to a case as early as 1684. *Lady Ivy's Trial,* 10 How. St. Tr. 555, 628 (1684).

However, the government contended, and the Second Circuit agreed (53a-57a), that the inspection provisions of 26 U.S.C. §§5146(b) and 7606(a) resulted in a waiver of petitioner's Fourth Amendment rights. We submit on the contrary that these sections do not have any such result. It may also be observed that, as in *Frank* v. *Maryland,* 359 U.S. 360 (1959), 26 U.S.C. §7342 provides for a fine of $500 for a refusal to permit an examination under 26 U.S.C. §7606.

Furthermore, if sections 5146(b) and 7606(a) were to have any such result as the waiver of petitioner's Fourth Amendment rights, these sections would themselves be unconstitutional as violating that amendment.

Whether there may be a waiver of a federal constitutional right, to operate not contemporaneously but *in futuro,* is at least an open question. The Court adumbrated the question in *Gardner* v. *Broderick,* 392 U.S. 273, 278-79 (1968), and *Uniformed Sanitation Men* v. *Comm'r of Sanitation,* 392 U.S. 280, 284 n. 5 (1968), but did not reach it. See also *Spevack* v. *Klein,* 385 U.S. 511 (1967), and *Garrity* v. *New Jersey,* 385 U.S. 493 (1967).

The Supreme Court of Michigan did decide the question. It held in *People ex rel. Attorney General* v. *Lansing Mu-*

nicipal Judge, 327 Mich. 410, 42 N.W. 2d 120 (1950), that a statutory provision permitting conservation officers to make certain wild life inspections without a warrant, was unconstitutional as permitting unreasonable searches and seizures. The Court reasoned:

> Under Michigan law a man may not marry a wife, operate a motor vehicle on the highways, practice law, or a number of other things, without a license from the State. May the legislature condition the granting of such licenses upon the applicant's waiver of his constitutional rights against unreasonable search of his home, marital chamber, automobile, law office or other place where a licensed activity occurs? * * *

327 Mich. at 431, 42 N.W. 2d at 125. *Cf. United States* v. *Stanack Sales Co.,* 387 F.2d 849 (3d Cir. 1968), where the Third Circuit applied *See* v. *City of Seattle,* 387 U.S. 541 (1967), to inspectors of the Food and Drug Administration; and refused to find a waiver of Fourth Amendment rights.

To the same effect as the Michigan case is *Finn's Liquor Shop, Inc.* v. *State Liquor Authority,* 24 N.Y. 2d 647, 301 N.Y.Supp. 2d 584, 249 N.E. 2d 440 (1969). There the New York Court of Appeals applied *See* v. *City of Seattle,* 387 U.S. 541 (1967), *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), as well as *Mapp* v. *Ohio,* 367 U.S. 643 (1961), to a warrantless search and seizure by inspectors of the New York State Liquor Authority, despite the fact that New York Alcoholic Beverage Control Law, §17, subd. 7, and §106, subd. 15, permit representatives of the State Liquor Authority to inspect any and all premises where alcoholic beverages are manufactured or sold. Chief Judge Fuld in the court's opinion, after citing *See* and *Camara,* continued:

> * * * In *See* (387 U.S. 541, *supra*), the Supreme Court invalidated a local ordinance which, similar to

the provisions relied upon by the Authority, required owners of business establishments to permit administrative inspections of their premises without a warrant. The court held that, with respect to those portions of business property not open to the public, the Fourth Amendment protections apply. In reaching that conclusion, the court declared (p. 543):

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant."

Although the court did indicate that the Constitution might not inhibit certain narrowly defined inspection procedures (cf. *Colonnade Catering Corp.* v. *United States,* 410 F. 2d 197), the implication of the decision in the *See* case is clear. No State may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Applying this principle to the present case, it follows that the investigator's entry into the back room of the store and, particularly, his search of the coat may not be constitutionally justified. 24 N.Y. 2d at 658, 301 N.Y.S. 2d at 591, 249 N.E. 2d at 445.

The government, and the Second Circuit (51a), relied on *Zap* v. *United States,* 328 U.S. 624 (1946). Whatever that case may say, there was involved no forcible entry. As the Court itself stated:

> * * * No force or threat of force was employed. Indeed, the inspection was made with the full cooperation of petitioner's staff. * * *

> • • • They [the governmental agents] did not obtain access by force, fraud, or trickery. • • • 328 U.S. at 628, 629.

The government, and the Second Circuit (54a), also relied on *Shapiro* v. *United States,* 335 U.S. 1 (1948). *Shapiro* is a Fifth Amendment case where the Court created a required records exception to the privilege against self-incrimination. To the extent that the language in that case, a five-to-four decision of more than two decades ago, may be thought to support a waiver *in futuro* of constitutional rights, the case is due for re-examination.

Conclusion

Just as writs of assistance in colonial days, so warrantless inspections by agents of the Internal Revenue Service today, would (in the living words of James Otis in his argument against the legality of writs of assistance) place "the liberty of every man in the hands of every petty officer". The Court should hold *See* v. *City of Seattle,* 387 U.S. 541 (1967), applicable to warrantless forcible entries and the resultant illegal searches and seizures by federal officials, reverse the judgment of the Second Circuit, and affirm that of the District Court.

Respectfully submitted,

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